

## Fair Political Practices Commission

### Memorandum

**To:** Chairman Randolph and Commissioners Blair, Downey, Karlan and Knox

**From:** Kelly L. Winsor, Legal Analyst, Legal Division  
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**Subject:** Annual Technical Clean-Up Packet  
Adoption of Proposed Amendments to Regulations 18320, 18321, 18361, 18370, 18419, 18420, 18703.1 and 18747

**Date:** August 11, 2003

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#### Background:

The Legal Division periodically conducts a review of Commission regulations to keep them current. Several technical “clean-up” amendments are proposed which eliminate outdated references or make similar conforming changes. All of the proposed amendments are non-substantive in nature. The amendments were noticed on August 1, 2003. As of the date of this memorandum, no public comments have been received. Staff recommends adoption of these amendments at the September 2003 Commission meeting.

#### Overview of the Specific Regulations (attached):

***Amend 2 Cal. Code Regs. section 18320(e):*** The obsolete reference to 2 Cal. Adm. Code Section 18321 needs to be amended to 2 Cal. Code Regs. section 18321.

***Amend 2 Cal. Code Regs. section 18321:*** Amend Sections 18322 and 18324 to 2 Cal. Code Regs. sections 18322 and 18324 to clarify reference to Commission regulations.

***Amend 2 Cal. Code Regs. section 18361:*** Regulation 18361, implementing Government Code section 83115.5, establishes a procedure to govern the provision of notice to respondents against whom the Commission has initiated enforcement proceedings. In subdivision (d), current regulation 18361 allows service of process to be made upon a respondent by service of process or registered mail with return receipt requested.

Government Code section 8311 provides that “[w]herever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be a sufficient compliance with the requirements of such law.” Government Code § 8311.

The Commission’s ability to effect service of process by certified mail is not apparent in

a reading of the current language of regulation 18361, when read without reference to Government Code section 8311. However, when read in the context of Government Code section 8311, it is clear that the scope of regulation 18361, subdivision (d) includes service of process by certified mail.

The amendment of regulation 18361 to specify “certified mail” as a service of process option would provide clear notice to regulated parties and other stakeholders, unfamiliar with Government Code section 8311, that certified mail is an appropriate service option, without materially altering the current regulation. Specifically, this technical amendment would align regulation 18361 with current law.

***Amend 2 Cal. Code Regs. section 18370(c):*** The statutory requirement that state agencies shall consult with the Commission and the Attorney General regarding appropriate course content before conducting each ethics orientation course required by Government section 11146.1 actually exists in Government Code section 11146.4(c). Current regulation 18370 incorrectly references Government Code section 11146.4(b). This amendment would correct the error.

***Amend 2 Cal. Code Regs. section 18419:*** Government Code section 82048.7(a) provides that a “[s]ponsored committee” means a committee, other than a candidate controlled committee, which has one or more sponsors. Any person, except a candidate or other individual, may sponsor a committee.” Government Code section 82048.7(b) provides that “[a] person sponsors a committee if any of the following apply: . . .” Regulation 18419 was adopted in 1977 to interpret and implement Government Code section 82048.7. As currently written, regulation 18419(a)(2) provides “[s]ponsor” of a committee means any person, except a candidate, proponent, or other individual to whom any of the following applies: . . .” Insertion of a comma after “individual” in subdivision (a)(2) of regulation 18419 is necessary to make the exceptions to the meaning of “person” consistent with Government Code section 82048.7.

***Amend 2 Cal. Code Regs. section 18420:*** Regulation 18420 concerns reporting of campaign contributions and expenditures of state or local government agencies. Staff recommends adding a reference to Government Code section 54964 (statute concerning restrictions on local agencies’ expenditures on ballot measures) to the “Comment” in regulation 18420.

***Amend 2 Cal. Code Regs. section 18703.1:***

***Background:*** Historically, the rules concerning “parents, subsidiaries, and otherwise related business entities” have been contained in two separate regulations. Former regulation 18706 provided that an official has a *financial interest* in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on any business entity *which is a parent or subsidiary of, or is otherwise related to a business entity in which the official has a financial interest.* A separate regulation, regulation 18236, defined “parent, subsidiary, or **otherwise related business entity**” as it is currently defined in regulation 18703.1. The two sections read together provided that where a business was a parent, subsidiary or otherwise related to a business entity in which the official had an economic interest, the parent, subsidiary or otherwise related business would “stand in the shoes” of the business in which the official held the economic interest. In other words:

- A public official has a “financial interest” in a decision if the decision will have a foreseeable and material financial effect on a business entity in which he or she has an investment.
- *In addition*, the public official has a “financial interest” in a decision if the decision will have a foreseeable and material financial effect on a business entity that is a parent, subsidiary or is otherwise related to the business in the first bullet. This is the case even if the official holds no stock, receives no income, and holds no employment relationship with this otherwise related business.

In simpler terms, the Act deems that the official has an economic interest *in both* the investment interest and the parent, subsidiary or business that is otherwise related to that business. The official then will determine whether a decision will have a material financial effect on either of these businesses to determine if he or she has a conflict of interest.

In 1998, the existing rules regarding parents, subsidiaries, and otherwise related business entities were merged and moved into regulation 18703.1 (step 3 of the standard analysis). The rationale was as follows:

“Proposed subsection (c) is simply current Regulation 18706 (‘Financial Interests in Decisions Affecting Parents, Subsidiaries, or Otherwise Related Business Entities’), ‘cut-and-pasted’ to a new place. There are no changes to this language, other than paragraph renumbering.

“This is an example of ‘compartmentalization,’ which is one of the primary means by which we hope to simplify the regulations. It is self-evident that the ‘otherwise-related-business-entities’ rules are closely linked to other rules about business entities. Yet, in the current structure, they are stated in a section removed from the other rules. The proposed move to subsection (c), without otherwise changing the language, compartmentalizes the business entities rules in one place.

“Proposed subsection (d) is current Regulation 18236, which defines ‘Parent, Subsidiary, Otherwise Related Business Entity.’ Again, the existing language is ‘cut-and-pasted’ without substantive change, other than paragraph renumbering. Again, the purpose served is compartmentalization with similar rules.” (Staff memorandum re: Second pre-notice discussion of proposed restructuring of conflict of interest regulations, dated August 21, 1998.)

As the memorandum points out, there was no intent to alter the existing advice under the otherwise related business entity rules.

*The Problem:* Step three is the appropriate location for the rule since the official is deemed to also have an economic interest in businesses which are parents, subsidiaries, or otherwise related to the investment interest. This is consistent with prior advice.

What is problematic is that the language of the old rule was imported, without change, into a step 3 regulation. The old rule was self-contained (as opposed to a single step in an 8-step process) and dealt with whether the official had a financial interest in the second business. This necessarily included the “economic interest” determination, as well as the materiality and foreseeability determinations.

In contrast, in its new location, the rule is merely a step in a multi-step analysis. Inadvertent insertion of the materiality and foreseeability analysis into step 3 is redundant and confusing and can lead to absurd interpretations that are inconsistent with the prior advice.

*The Proposal:* Amend the language to conform to its new location as a step 3 regulation by removing the superfluous language that inadvertently imports step 5 and 6 analysis (materiality and foreseeability) into a step 3 regulation.

***Amend 2 Cal. Code Regs. section 18747(d)(1):*** Current regulation 18747(d)(1) indicates "significant segment" as being set forth in 2 Cal. Code Regs. section 18707(b)(1). "Significant segment" is defined in 2 Cal. Code Regs. section 18707.1(b)(1). The proposed amendment corrects the reference in regulation 18747(d)(1) from 18707 to 18707.1.

Attachments: Regs. 18320, 18321, 18361, 18370, 18419, 18420, 18616, 18703.1 and 18747

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